

AVNER GREENWALD, individually and on
behalf of all others similarly situated,

V.

Defendants.

**[PROPOSED] ORDER DENYING
PLAINTIFF’S MOTION TO REMAND**

1 The Court, having considered the Plaintiff's Motion to Remand ("Motion"), the
2 Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion, Plaintiff's
3 Reply In Further Support of his Motion, declarations and exhibits, as well as the files in the case
4 and any oral argument presented, and for good cause shown therein, it is hereby ORDERED as
5 follows:

6 The Motion is DENIED on the grounds that the above-captioned matter was properly
7 removed under the Class Action Fairness Act, 28 U.S.C. §§ 1332(d), 1453 ("CAFA").

8 Under CAFA, a putative class action may be removed to the appropriate federal district
9 court if (1) the action purports to be a "class" action brought on behalf of 100 or more members;
10 (2) any member of a class of plaintiffs is a citizen of a foreign country and any defendant is a
11 citizen of a state; and (3) the amount in controversy exceeds \$5 million. See 28 U.S.C.
12 §§ 1332(d)(2), (5)(B), 1453(b). Plaintiff does not dispute that this Action meets these three
13 requirements. First, Plaintiff purports to assert claims on behalf of a "class" consisting of
14 "thousands of members." (Compl. ¶¶ 87, 89.) Second, alienage jurisdiction exists because at least
15 three of the Defendants are allegedly citizens of California (Compl. ¶¶ 15-27) and there are
16 members of the putative class who are citizens of foreign countries; Plaintiff himself is a resident
17 and citizen of Israel. (Compl. ¶¶ 14, 87; Mot. 5:1-11.) Third, as Plaintiff seeks rescission of sales
18 of XRP, which he alleges in the first quarter of 2018 alone, "Defendants sold at least \$167.7
19 million worth of XRP" (Compl. ¶ 52), the amount in controversy requirement is met. Finally, none
20 of the exceptions that preclude CAFA removal apply, nor has Plaintiff alleged that they do. See 28
21 U.S.C. § 1453(d)(1)-(3).

22 The Ninth Circuit's decision in Luther v. Countrywide Home Loans Servicing LP, 533 F.3d
23 1031 (9th Cir. 2008), does not bar removal here. The presence of alienage jurisdiction under
24 CAFA and the foreign relations issues it raises make Luther distinguishable from this case. The
25 Luther court was not asked to consider, and did not consider, the "peculiarly federal interest[s]"
26 alienage jurisdiction raises, 17th St. Assocs., LLP v. Markel Int'l Ins. Co., 373 F. Supp. 2d 584,
27 602 (E.D. Va. 2005), or the effect on Section 22(a) of CAFA's extension of alienage jurisdiction.
28 Rather, Luther considered only whether Section 22(a) barred removal of a securities case in a

1 circumstance in which the minimal diversity provisions of CAFA expressly permit removal.
 2 Luther's reasoning does not support remand here because application of Section 22(a) to an
 3 alienage jurisdiction removal under CAFA would "unduly interfere" with the operation of CAFA.
 4 See Radzanower v. Touche Rosss & Co., 426 U.S. 148, 156 (1976); Fed. Home Loan Bank of S. F.
 5 v. Deutsche Bank Sec., Nos. 10-3039 SC, 10-B045SC, 2010 WL 5394742, at *6 (N.D. Cal. Dec.
 6 20, 2010).

7 Instead, the plain language of CAFA permits removal despite Section 22(a). Under
 8 §1453(d), CAFA expressly excepts certain class actions from removal that "solely" involve a
 9 claim: (1) concerning a "covered security," as defined by 15 U.S.C. § 77p(f)(3); (2) relating to the
 10 internal affairs or governance of a corporation and arise under the laws of the state in which such
 11 corporation was formed; or (3) relating to the rights, duties, and obligations relating to or created
 12 by or pursuant to any security. See 28 U.S.C. § 1453(d)(1)-(3). "[R]ead as a whole, CAFA's plain
 13 language 'creates original jurisdiction for and removability of all class actions that meet the
 14 minimal requirements and do not fall under one of the limited exceptions.'" Coffey v. Ripple Labs
 15 Inc., No. 18-cv-03286-PJH, 2018 WL 3812076, *7 (N.D. Cal. Aug. 10, 2018) (quoting New Jersey
 16 Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4, 581 F. Supp. 2d 581, 584
 17 (S.D.N.Y. 2008)); see also Katz v. Gerardi, 552 F.3d 558, 562 (7th Cir. 2009) (concluding that
 18 claims falling within the exceptions are not removable, but "[o]ther securities class actions are
 19 removable if they meet the requirements of" CAFA).

20 Section 1453 does not have an unwritten fourth exception for cases falling within the
 21 removal bar in Section 22(a). See Coffey, 2018 WL 3812076, at *8. The general removal statute,
 22 Section 1441(a), states: "*Except as otherwise provided by Act of Congress*, any civil action
 23 brought in a State court of which the district courts of the United States have original jurisdiction,
 24 may be removed. . . ." 28 U.S.C. § 1441(a). (emphasis added). "[C]ourts have interpreted
 25 § 1441(a)'s broad except clause as a reference to antiremoval provisions in other federal statutes."
 26 Coffey, 2018 WL 3812076, at *8 (collecting cases). "The absence of § 1441(a)'s except clause, or
 27 anything even resembling it [in § 1453], weighs heavily against reading such a broad exception
 28 into § 1453." Id. This is especially so given that the specific exceptions in Section 1453(d) pertain

1 to certain types of securities claims. “That Congress considered and excepted one part of the
 2 Securities Act but did not reference § 22(a), strongly suggests that the court should not read
 3 additional Securities Act exceptions into CAFA.” Id. at *9.

4 Moreover, any interpretation under which Section 22(a) barred removal under CAFA, even
 5 though CAFA has no “except” clause, would render the “except” clause in Section 1441(a)
 6 superfluous. See Duncan v. Walker, 533 U.S. 167, 174 (2001) (noting rule of statutory
 7 interpretation against treating “statutory terms as surplusage”). “[I]f § 1441(a)’s except clause is to
 8 be taken seriously, then it should not be read into every [other] removal statute” because it would
 9 “render[] the except clause entirely superfluous.” Coffey, 2018 WL 3812076, at *9. Likewise, the
 10 separate removal provision found in § 1453(b) “itself becomes largely superfluous if it is read to
 11 include § 1441(a)’s exception.” Id. at *10. If an action satisfying CAFA’s requirements were
 12 removed pursuant to § 1441(a), then this “would subject the removal to § 1441(a)’s except clause
 13 and the entire array of federal antiremoval statutes” including § 22(a)’s removal bar. Id. “If
 14 Congress wanted that result, it could have omitted § 1453(b) entirely. Instead, Congress enacted an
 15 entirely different removal provision that does not include anything resembling § 1441(a)’s broad
 16 except clause.” Id. Thus, the text and structure of CAFA confirm that Congress did not intend for
 17 Section 22(a)’s removal bar to apply to cases removed pursuant to CAFA.

18 Furthermore, the decision in Luther should be limited to its facts and not expanded to bar the
 19 removal of international class actions, or it should be reconsidered. First, “part of Luther’s
 20 reasoning has been undermined by the Supreme Court’s decision in” Dart Cherokee Basin
 21 Operating Co. v. Owens, 135 S. Ct. 547, 551 (2014). Coffey, 2018 WL 3812076, at *4. As this
 22 Court explained, “[t]he Luther court relied on the Ninth Circuit’s general rule that ‘removal statutes
 23 are strictly construed against removal,’ and that ‘any doubt is resolved against removability.’” Id.
 24 However, in Dart Cherokee, the Supreme Court concluded that “‘no antiremoval presumption
 25 attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class
 26 actions in federal court.’” Coffey, 2018 WL 3812076, at *4 (quoting Dart Cherokee, 135 S. Ct. at
 27 554). As such, the Ninth Circuit has “recognized that Dart Cherokee undermines Luther’s
 28 reasoning on that point.” Id. (citing Jordan v. Nationstar Morg. LLC, 781 F.3d 1178, 1183 n.2 (9th

1 Cir. 2015)). “And one [other] authority has suggested that Dart Cherokee’s ‘assertion that no
 2 antiremoval presumption applies to cases removed under CAFA,’ calls into question Luther’s
 3 holding regarding § 22(a) and § 1453.” Id. (quoting Moore et al., 16 Moore’s Federal Practice -
 4 Scope of Removal § 107.91[1][b] (2018)).

5 Second, other courts have expressly disagreed with the holding in Luther. See Katz, 552
 6 F.3d at 562; HarborView, 581 F. Supp. 2d at 587-88. The reasoning of these courts is persuasive
 7 and counsels against expanding Luther to bar removal of actions removed under alienage
 8 jurisdiction.

9
 10 IT IS SO ORDERED.

11 DATED: _____, 2018

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 13 _____
 14 Hon. Phyllis J. Hamilton
 15 United States District Judge
 16 Northern District of California

17 Respectfully submitted by:

18 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

19 By: _____
 20 *s/ Peter B. Morrison*
 21 Peter B. Morrison
 22 Attorneys for Defendants
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